Mayland Lending Sdn Bhd v Rossmaizati bt Mohamad & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–939 OF 2010
LIM CHONG FONG JC
21 MAY 2014

Civil Procedure — Action — Cause of action — Action for recovery of loan filed before commenncement of repayment period — Whether action premature

Moneylenders — Unsecured loan — Default on repayment of loan — Claim against borrower and guarantors — Whether loan agreement conformed with prescribed form — Whether agreements executed under coercion or duress — Whether signature on agreement forged — Whether rate of interest proper — Whether proper statement of account and payment produced in prescribed form — Whether guarantee void for lack of consideration — Whether action for recovery of loan premature — Moneylenders Act 1951 ss 17(1), 17A & 19

The plaintiff was a licensed money lender under the Moneylenders Act 1951 ('the Act'). By a money lending agreement ('the loan agreement'), the plaintiff agreed to lend a sum of RM10,000,000 to a company called Apac Sunrise Trading Sdn Bhd ('Apac Sunrise'). The defendants were guarantors to this loan. The first defendant was a former director whilst the second defendant was still a director of Apac Sunrise. Apac Sunrise failed to repay the loan. Pursuant to negotiations, a settlement agreement was executed on 20 February 2009 ('the first settlement agreement'). Pursuant to cl 3b of the first settlement agreement, both defendants executed a letter of guarantee and undertaking dated 20 February 2009 ('the guarantee'). Apac Sunrise defaulted payment under the first settlement agreement and the plaintiff thus commenced legal action against Apac Sunrise and the defendants. However, pursuant to further negotiations, another settlement agreement was executed on 25 June 2010 ('the second settlement agreement (SSA)') that included the withdrawal of the legal suits. There was also written declaration of trust dated 25 June 2010 ('Declaration of Trust') made by the second defendant to the plaintiff appended to the SSA which had the express provision that the validity and enforceability of the guarantee shall not be in any way affected by the SSA. Apac Sunrise further defaulted and hence the present proceeding was commenced by the plaintiff to recover the outstanding amounts. The first defendant contended that: (i) the frst settlement agreement was signed by her under duress and after the execution of the first settlement agreement, she then realised that she actually signed the guarantee; (ii) the SSA was executed without her knowledge and consent; and (iii) the SSA superceded/cancelled the loan agreement, first settlement agreement and the guarantee. The second

defendant contended that: (i) the loan agreement contravened the Act; (ii) the first settlement agreement was entered between the plaintiff and Apac Sunrise and he had no knowledge of the terms therein; (iii) the first settlement agreement also contravened the Act; (iv) the guarantee was unenforceable because the guarantee was without consideration and/or was of past consideration; and (v) the SSA superceded/cancelled all agreements whether oral or written made prior to the SSA. According to the second defendant, the plaintiff failed to provide the particulars of the outstanding amount claimed in the form as per the First Schedule A thereby contravening s 19 of the Act and the plaintiff's claim of RM10,362,958 included wrongly charged interest rate of 1% per month instead of default interest rate of 8%pa from 9 December 2008 to 8 February 2009 and subsequent interest rate of 14.4%pa as set out in the first settlement agreement in contravention of s 17(1) and 17A of the Act. The guarantee was said to be void by virtue of s 26 Contracts Act 1950.

Held, dismissing the plaintiff's claim with no order as to costs:

(1) The first defendant was a non-practicing advocate and solicitor by profession and was undoubtedly able to comprehend the proposed terms of the first settlement agreement. The terms were rather straightforward. Likewise, PW1 was a non-practicing advocate and solicitor. The other staffs of the plaintiff namely PW2 and PW3 were also professional men. The three of them who met the first defendant on 10 February 2009 were therefore not hooligans or ruffians of the street often hired by loan sharks for debt collection. They would not have intimidated the first defendant. Further, alterations made to the agreement suggested that the agreement was signed voluntarily rather than by compulsion. It was a firm commercial bargain conducted in a tense atmosphere. The first defendant was at all material times not threatened with physical harm. The first defendant did not also subsequently make any police report on the incident. This would have been the natural follow up consequence if she was in fact put under duress and false imprisonment. Consequently, the first defendant was not under duress when she signed the first settlement agreement. The first defendant also was not subjected to actionable coercion as defined in the Contracts Act 1950 (see paras 35–37 & 41).

(2) After the first settlement agreement was dated, it was followed with signing of the guarantee by both the defendants without protest whatsoever. The second defendant's contention that he was unaware of the terms of the first settlement agreement could not therefore be accepted as otherwise, he would not have signed the guarantee that was based and hinged on that settlement agreement (see para 35).

(3) As for the first defendant's contention that she did not sign the first settlement agreement, the guarantee, several letters and two cheques for

the sum of RM10,000,000 and RM673,424.65 and that the signature on those documents was forged. The first defendant's allegation of forgery was plainly an afterthought and could not be accepted both on the pleadings as well as by reason of estoppel for having agreed pre-trial to the authenticity and contents of the documents. The first defendant had also not discharged her onus of proof of forgery. It was insufficient for the first defendant to just make a bare assertion that her signature on those documents was forged (see paras 44 & 46–47).

(4) Clause 11 of the SSA did not void or nullify the first settlement agreement. The second defendant had even expressly recognised the continuing validity and effect of the guarantee in the declaration of trust that was signed concurrently with the SSA pursuant to cl 11 thereof (see para 56).

(5) There was firstly no evidence adduced by the second defendant of Apac Sunrise's written demand for the statement of account and payment of the prescribed charge made by the second defendant. Hence, the plaintiff was not obliged to supply the statement. In any case, the plaintiff had produced for the trial a statement of account which in substance complied with the Act. It was not fatal if the prescribed form had not been followed as made clear in s 62 of the Interpretation Acts 1948 and 1967 (see para 61).

(6) The loan agreement conformed to the Act. It was clear from the execution of the first settlement agreement and the SSA that the rate of interest of 14.4%pa and the computation of the amounts owing therein were plainly agreed to between the plaintiff and Apac Sunrise. There was valuable consideration by way of the extended time given for the loan repayment via instalments comfortable to Apac Sunrise and the second defendant particularly. Apac Sunrise had also willingly paid the sum of RM110,465.75 to the plaintiff being interest charged at the rate of 14.4%pa from 9 February 2009 to 8 March 2009. By such conduct, Apac Sunrise and the defendants were estopped from now resiling on their earlier position adopted (see para 65)

(7) The consideration for the guarantee was plainly seen in the preamble of the document where the defendants as guarantors and principal debtors requested the plaintiff to enter into the first settlement agreement that was concurrently executed with the guarantee. In the premise, the second defendant's argument on this point was bad in limine (see para 68).

(8) The writ was filed on 30 June 2010. However, repayment pursuant to the SSA was only to commence on 1 August 2010. The plaintiff's cause of action had not yet accrued against the defendants both as guarantors and principal debtors of the obligations of Apac Sunrise under the SSA at the

A date of filing of the writ. Hence, the plaintiff's action against both the first and second defendants pursuant to the guarantee was premature (see para 70)

[Bahasa Malaysia summary

B Plaintif adalah peminjam wang berlesen di bawah Akta Pinjaman Wang 1951 ('Akta'). Melalui perjanjian pinjaman wang ('perjanjian pinjaman'), plaintif bersetuju untuk meminjamkan sejumlah wang sebanyak RM10,000,000 kepada sebuah syarikat bernama Apac Sunrise Trading Sdn Bhd ('Apac Sunrise'). Defendan-defendan adalah penjamin kepada pinjaman tersebut.
C Defendan pertama adalah pengarah terdahulu manakala defendan kedua adalah pengarah di Apac Sunrise. Apac Sunrise gagal untuk membayar pinjaman. Berikutan rundingan-rundingan, satu perjanjian penyelesaian telah dilaksanakan pada 20 Februari 2009 (perjanjian penyelesaian pertama). Menurut klausa 3b kepada perjanjian penyelesaian pertama, kedua-dua
D defendan menandatangani surat jaminan dan akujanji bertarikh 20 Februari 2009 ('jaminan'). Apac Sunrise mengingkari penyelesaian di bawah perjanjian pembayaran pertama dan plaintif memulakan tindakan undang-undang terhadap Apac Sunrise dan defendan-defendan. Walau bagaimanapun, berikutan rundingan-rundingan lanjut, satu lagi perjanjian penyelesaian telah
E dilaksanakan pada 25 Jun 2010 (perjanjian penyelesaian kedua (SSA)) yang memasukkan penarikan tindakan undang-undang. Terdapat juga deklarasi amanah bertulis bertarikh 25 Jun 2010 (deklarasi amanah) dibuat oleh defendan kedua kepada plaintif dilampirkan bersama SSA yang mana mempunyai proviso nyata bahawa keesahan dan penguatkuasaan jaminan
F tidak akan dalam apa-apa cara dijejaskan oleh SSA. Apac Sunrise selanjutnya ingkar dan maka prosiding ini telah dimulakan oleh plaintif untuk mendapatkan semula jumlah tertunggak. Defendan pertama menghujahkan bahawa: (i) perjanjian penyelesaian pertama telah ditandatanganinya di bawah dures dan selepas pelaksanaan perjanjian penyelesaian pertama, dia kemudian
G menyedari bahawa dia telah menandatangani jaminan; (ii) SSA telah dilaksanakan tanpa pengetahuan dan persetujuannya; dan (iii) SSA telah menggantikan/membatalkan perjanjian pinjaman, perjanjian penyelesaian pertama dan jaminan. Defendan kedua menghujahkan bahawa (i) perjanjian pinjaman melanggari Akta; (ii) perjanjian penyelesaian pertama telah dimasuki
H antara plaintif dan Apac Sunrise dan dia tidak mempunyai pengetahuan terma-terma di dalamnya; (iii) perjanjian penyelesaian pertama juga melanggar Akta; (iv) jaminan tidak boleh dikuatkuasakan kerana jaminan adalah tanpa balasan dan/atau adalah balasan dahulu; dan (v) SSA menggantikan/membatalkan kesemua perjanjian sama ada lisan atas bertulis
I yang dibuat sebelum SSA. Menurut defendan kedua, plaintif gagal untuk mengemukakan butiran-butiran jumlah tertunggak yang dituntut di dalam borang seperti mana Jadual Pertama A dengan itu melanggar s 19 Akta dan tuntutan plaintif sebanyak RM10,362,958 termasuk kadar faedah yang dikenakan salah sebanyak 1% setiap bulan daripada kadar faedah ingkar

sebanyak 8%pa dari 9 Disember 2008–8 Februari 2009 dan kadar faedah berikutnya sebanyak 14.4%pa seperti yang ditetapkan di dalam perjanjian penyelesaian pertama bercanggah dengan s 17(1) dan 17A Akta. Jaminan itu dikatakan tidak sah menurut kuasa s 26 Akta Kontrak 1950. A

Diputuskan, menolak tuntutan plaintif tanpa perintah terhadap kos: B

(1) Defendan pertama adalah peguambela dan peguamcara profesional yang tidak beramal dan sudah pasti dapat memahami terma-terma yang dicadangkan perjanjian penyelesaian pertama. Terma-terma adalah jelas. Begitu juga PW1 adalah peguambela dan peguamcara yang tidak beramal. Pekerja-pekerja plaintif yang lain iaitu PW2 dan PW3 juga penjawat profesional. Ketiga-tiga mereka yang berjumpa defendan pertama pada 10 Februari 2009 oleh itu adalah bukan samseng jalanan yang selalu diupah oleh pemberi pinjaman haram untuk mengutip hutang. Mereka tidak mungkin akan menakut-nakutkan defendan pertama. Tambahan lagi, pemindaan yang dibuat kepada perjanjian mencadangkan perjanjian itu telah ditandatangani secara sukarela bukannya dengan paksaan. Ia adalah tawaran komersial tegas yang dijalankan dalam suasana tegang. Defendan pertama pada setiap waktu material tidak diugut dengan kecederaan fizikal. Defendan pertama juga tidak kemudiannya membuat apa-apa laporan polis berkaitan insiden itu. Ini akan menjadi susulan semula jadi akibat jika dia telah sebenarnya diletakkan di bawah dures dan penahanan salah. Oleh itu, defendan pertama tidak dalam keadaan terpaksa apabila dia menandatangani perjanjian penyelesaian yang pertama. Defendan pertama juga tidak tertakluk kepada paksaan diambil tindakan sebagaimana yang ditakrifkan dalam Akta Kontrak 1950 (lihat perenggan 35–37 & 41). C D E F

(2) Selepas perjanjian penyelesaian pertama diberikan tarikh, ia diikuti dengan tandatangan kepada jaminan oleh kedua-dua defendan tanpa sebarang protes. Hujahan defendan kedua bahawa dia tidak menyedari terma-terma perjanjian penyelesaian pertama oleh itu tidak boleh diterima sebagai sebaliknya, dia tidak akan menandatangani jaminan itu yang berdasarkan dan tertakluk kepada perjanjian penyelesaian (lihat perenggan 35). G H

(3) Untuk hujahan defendan pertama bahawa dia tidak menandatangani perjanjian penyelesaian pertama, jaminan itu, beberapa surat dan dua cek untuk jumlah RM10,000,000 dan RM673,424.65 dan bahawa tandatangan pada dokumen-dokumen itu telah dipalsukan. Dakwaan pemalsuan oleh defendan pertama adalah jelas sesuatu yang difikirkan kemudian dan tidak boleh diterima pada kedua-dua pliding dan juga dengan alasan estopel kerana telah bersetuju pra-perbicaraan kepada ketulenan dan kandungan dokumen. Defendan pertama tidak melepaskan beban pembuktian pemalsuan. Ia adalah tidak mencukupi I

untuk defendan pertama untuk membuat dakwaan kosong bahawa tandatangannya pada dokumen-dokumen telah dipalsukan (lihat perenggan 44 & 46–47).

(4) Klausa 11 SSA tidak, tidak sah atau membatalkan perjanjian penyelesaian pertama. Defendan kedua juga secara nyata telah mengiktiraf keesahkan yang berterusan dan kesan jaminan dalam akuan amanah yang ditandatangani serentak dengan SSA menurut klausa 11 (lihat perenggan 56).

(5) Pertamanya, tiada keterangan yang dikemukakan oleh defendan kedua terhadap tuntutan bertulis Apac Sunrise untuk penyata akaun dan bayaran caj ditetapkan yang dibuat oleh defendan kedua. Maka, plaintif tidak bertanggungjawab untuk membekalkan penyata. Lagipun, plaintif telah mengemukakan penyata akaun percubaan yang mana mematuhi Akta. Ia adalah tidak fatal jika borang yang ditetapkan tidak diikuti sebagaimana yang dinyatakan dalam s 62 Akta Tafsiran 1948 dan 1967 (lihat perenggan 61).

(6) Perjanjian pinjaman mematuhi Akta. Ia adalah jelas daripada pelaksanaan perjanjian penyelesaian pertama dan SSA bahawa kadar faedah 14.4%pa dan pengiraan jumlah terhutang di dalamnya jelas dipersetujui antara plaintif dan Apac Sunrise. Terdapat balasan bernilai melalui cara pelanjutan masa yang diberikan untuk pembayaran pinjaman melalui ansuran yang mudah untuk Apac Sunrise dan terutama sekali defendan kedua. Apac Sunrise dengan rela telah membayar jumlah sebanyak RM110,465.75 kepada plaintif sebagai faedah yang dicaj pada kadar 14.4%pa daripada 9 Februari–8 Mac 2009. Dengan tindakan itu, Apac Sunrise dan defendan-defendan diestop daripada kembali mengguna pakai kedudukan awal mereka (lihat perenggan 65).

(7) Balasan untuk jaminan jelas dapat dilihat di dalam mukadimah dokumen yang mana defendan-defendan sebagai penjamin dan penghutang principal meminta plaintif untuk memasuki perjanjian penyelesaian pertama yang dilaksanakan serentak dengan jaminan. Kesimpulannya, hujahan defendan kedua terhadap perkara ini adalah tidak boleh diterima *in limine* (lihat perenggan 68).

(8) Writ telah difailkan pada 30 Jun 2010. Tetapi, pembayaran menurut SSA hanya bermula pada 1 Ogos 2010. Kausa tindakan plaintif belum terakru terhadap defendan-defendan kedua-duanya sebagai penjamin dan penghutang prinsipal kepada tanggungjawab Apac Sunrise di bawah SSA pada masa pemfailan writ. Maka, tindakan plaintif terhadap kedua-dua defendan pertama dan kedua berkaitan dengan jaminan adalah pramatang (lihat perenggan 70).]

Notes

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 57–84.

Cases referred to

Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors [1991] 2 MLJ 202; (1990) 5 MLRH 494, HC (refd)
Folin & Brothers Sdn Bhd v Wong Foh Ling & Wong Swee Lin & Ors [2001] 2 MLJ 23; [2000] 3 MLRH 751, HC (refd)
Ketteman and Others v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)
Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485; [1990] 1 CLJ (Rep) 141, SC (distd)
Lampleigh v Brathwait (1615) 80 ER 255, KBD (refd)
MS Amiruddin v Thomcos's Bank Ltd AIR 1963 SC 746, SC (refd)
Mahzan bin Othman v Perbadanan Usahawan Nasional Berhad [2012] 1 LNS 587, HC (refd)
Maplelee Property Sdn Bhd v Tan Lei Fon [2005] 1 CLJ 599, CA (refd)
Maskell v Homer [1915] 3 KB 106, CA (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585; [2005] 2 CLJ 596, CA (refd)
Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing [2006] 5 MLJ 589; [2006] 2 MLRH 338, HC (refd)
OCBC Securities (Melaka) Sdn Bhd (formerly known as Sykt Tan, Chow & Loh Securities Sdn Bhd) v Koh Kee Huat [2004] 2 MLJ 110, HC (refd)
Occidental Worldwide Investment Corpn v Skibs A/S Avanthi [1976] 1 Lloyd's Rep 293, QBD (refd)
Pao On v Lau Yiu Long [1980] AC 614, PC (refd)
Puteh Aman Power Sdn Bhd v Bittersweet Estate (Sabah) Sdn Bhd [2012] MLJU 834; [2012] 10 CLJ 723, HC (refd)
Raja Lob Sharuddin Raja Ahmad Tezali & Ors v Sri Seltras Sendirian Bhd [2008] 2 MLJ 87; [2007] 3 MLRA 224, CA (refd)
Roe v The Mutual Loan Fund, Limited (1887) 19 QBD 437, CA (refd)
SS Saw v Siew Heen Yuen & Ors (Siew Boon Hong @ Shandran & Ors, interveners) [2009] 2 MLJ 214; [2009] 2 CLJ 140, CA (refd)
Simetech (M) Sdn Bhd v Yeoh Cheng Liam Construction Sdn Bhd [1992] 1 MLJ 11, HC (refd)
Sio Koon Lin & Anor v SB Mehra [1981] 1 MLJ 225, FC (refd)
Soo Lip Hong v Tee Kim Huan [2006] 2 MLJ 49; [2005] 1 MLRA 801, CA (refd)
South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355, SC (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490; [1985] 1 MLRA 423, SC (refd)
Tan Kin Thuan v Tan Kee Kait (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Then Ming Ming v Mount Kinabalu Adventurous Travel (Sabah) Sdn Bhd &

Ors [2010] MLJU 1666; [2010] 12 MLRH 211, HC (refd)

Legislation referred to

Contracts Act 1950 ss 2(d), 15, 26, 86
Evidence Act 1950 ss 101, 102, 103
Indian Contracts Act 1872 [IND] s 133
Interpretation Acts 1948 and 1967 s 62
Moneylenders Act 1951 ss 17(1), 17A, 17A(1), 19 , 19(1)
Rules of the Supreme Court [UK] O 15 r 8(4)(a)

Arthur M W Wang (Wong Chooi Mei with him) (Arthur Wang Lian & Assoc) for the plaintiff.
Hazman bin Ahmad (Omar Ismail Hazman & Co) for the first defendant.
Sivapakiam Krishnan (Othman Hashim & Co) for the second defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a guarantee action arising from a money lending transaction.

[2] The plaintiff is a licensed money lender with license No WL5587/14/01–1/05408 issued pursuant to the Moneylenders Act 1951.

[3] The defendants are guarantors to the loan obtained by an Apac Sunrise Trading Sdn Bhd ('Apac Sunrise') from the plaintiff.

[4] The first defendant is a former director whilst the second defendant is presently still a director of Apac Sunrise.

THE TRIAL PROCESS

[5] This suit is filed on 30 June 2010 and the trial consumed three days on 21–22 January and 10 March 2014. During the course of the trial, the defendant applied to amend their pleadings to take into account the effect of the settlement agreement made between the plaintiff and Apac Sunrise on 25 June 2010. The amendment applications were allowed on 12 February 2014. The documentary evidence adduced is trial bundles B to F, I, J and exhs P1A to C, P2, P3, D4, D5, D6 (a)–(b), D7 and D8 (a)–(b).

The following witnesses testified for the respective parties:

(a) Han Seng Kwang ('PW1') the former legal manager of the plaintiff;

(b) Huam Yue Chai ('PW2') an accountant of the plaintiff;

(c) Yap Boon Teck ('PW3') the former group general manager of the plaintiff;

(d) Noor Halimaton bt Mohamad ('DW1') formerly personal assistant to the first defendant;

(e) Shairul Rizal bin Mohd Shawari ('DW2') formerly Logistics Officer of Apac Sunrise;

(f) Rossmaizati bt Mohamad ('DW3'), the first defendant herself; and

(g) Pua Woon Kee ('DW4'), the second defendant himself.

After the close of the trial, the parties submitted their written closing arguments-in-chief and in-reply concurrently. There was an oral clarification held on 15 April 2014 and the plaintiff and second defendant thereafter submitted further written submissions.

BACKGROUND FACTS

[6] By a money lending agreement dated 8 August 2008 ('the loan agreement'), the plaintiff agreed to lend a sum of RM10,000,000 to Apac Sunrise subject, inter alia, to payment of interest and repayment of the loan on or before 8 December 2008.

[7] Apac Sunrise failed to repay the loan by the stipulated date in the loan agreement and the plaintiff in January 2009 pursued recovery of the loan via negotiations with Apac Sunrise.

[8] By a letter dated 12 January 2009, Apac Sunrise proposed to the plaintiff to settle the loan by offering shares of Apac Sunrise to a Mayland Merit Sdn Bhd and requested for an extension of two months to complete the process. The offer did not appear to have been accepted by the plaintiff.

[9] The plaintiff accordingly resumed its pursuit to recover the loan and eventually reached a settlement with Apac Sunrise by the execution of a settlement agreement dated 20 February 2009 ('the first settlement agreement'). The following material terms of the first settlement agreement are reproduced:

> Acknowledgement
>
> 1. The Borrower hereby agrees and acknowledges that the Borrower is indebted to the Lender in the sum of RM10,000,000.00 together with interest thereon [hereinafter called 'the Debt'] and the Borrower hereby agrees to repay the Debt together with interest thereon at the rate of 14.4% per annum from the 9th December 2008 till date of full realization of the Debt.
>
> Repayment of Debt

2.1 The parties hereto agree that the Debt together with interest thereon shall by repaid by the Borrower to the Lender in the manner provided as follows:-

(a) a sum of RM200,00.00 being interest for the period from 9th December 2008 till 8th February 2009 to be paid immediately upon the execution of this Agreement;

(b) a sum of RM10,000,000.00 being the principle sum of Debt to be paid on or before the tfh June 2009 [the date of actual payment herein shall hereinafter be referred to as 'the Settlement Date'];

(c) interest on the Principle sum of RM10,000,000.00 at the rate of 14.4% per annum calculated from 9th February 2009 till the Settlement Date.

2.2 Towards repayment of the sum stated in paragraph 2.1(b) above, the Borrower shall deposit with the Lender immediately upon the execution of this Agreement a cheque for the sum payable in favour or the Lender and dated on the Settlement Date which cheque will be presented for payment by the Lender upon the Settlement Date.

Security for repayment

3.3 As security for the repayment of the Loan by the Borrower to the Lender in the manner stated hereinabove, the Borrower shall:-

(a) deposit with the Lender shares amounting to 30% of the shareholding of the Borrower which deposit shall be returned to the Borrower upon full settlement of the Debt by the Borrower to the Lender;

(b) cause its directors namely Dato' Pua Woon Kee and Rossmaizati Binti Mohammad to execute and deliver to the Lender a Letter of Guarantee and Indemnity to guarantee the performance by the Borrower of all its obligations under this Agreement.

Entire Agreement

9. This agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to the Debt. No addition to or modification of any provisions of this agreement shall be binding upon the parties unless made by written instrument signed by a duly authorised representative of both parties.

[10] Pursuant to cl 3b of the first settlement agreement, both the first and second defendants executed a letter of guarantee and undertaking dated 20 February 2009 ('the guarantee'). The material terms of the guarantee are as follows:

In consideration of you agreeing at our request to enter into the Settlement Agreement dated 20/2/09 ('the Settlement Agreement') with APAC Sunrise Trading (M) Sdn Bhd (Company No-579199-T) a private company incorporated in Malaysia and having its registered address at 11–2, Level 2, Jalan PJS8/11, Dataran Mentari, 46150 Bundar Sunway, Selangor Darul Ehsan ('hereinafter referred to as APAC') for the purpose of repayment of the agreed sums by APAC to you upon the terms and conditions contained in the Settlement Agreement, we, Pua

Woon Kee (NRIC No 691114–01–5549) of Bandar Baru Seri Petaling, 57000 Kuala Lumpur, Wilayah Persekutuan and Rossmaizati Binti Mohamad (NRIC No 670615-03-6134 of 43, Jalan USJ 2/5A, 47500 Subang Jaya, Selangor agree with you not merely as guarantors but as principal debtors as follows:-

(1) We hereby guarantee and be answerable and responsible to you for the repayment by APAC to you of the sum of *Ringgit Malaysia Ten Million (RM10,000,000.00) only* together with all interest thereon accruing ('the Sum') as stipulated in the Settlement Agreement.

(2) We hereby irrevocably and unconditionally guarantee and undertake to pay you the Sum in the event that APAC fails and/or neglects and/or refuses to pay you in the manner provided by the terms and condition prescribed in the Settlement Agreement.

(3) This Guarantee shall be a continuing guarantee to you for the payment of the Sum by APAC until the Sum together with all interest and any other sums that will be incurred by you shall be fully repaid by APAC or by us.

(4) In the event that APAC shall fail to pay the Sum as by the time prescribed in the Settlement Agreement, you shall then be entitled to without notice to APAC demand for the payment of the Sum from us. Any demands made by you shall be made at the absolute discretion of you and upon receipt of such notice, we shall repay to you all outstanding amount sums to including and not limited to the Sum.

(5) Any settlement or discharge between APAC and you and any other guarantor shall be subject to the condition that no security or payment to you by any of the guarantors shall be avoided or reduced by virtue of any provisions or enactments relating to bankruptcy, liquidation or insolvency for the time being in force and if any such security or payment shall be so avoided or reduced you shall be entitles to recover the value or the amount of it from any such guarantor subsequently just as if such discharge had not occurred.

[11] Apac Sunrise again failed to pay the plaintiff in accordance with the First Settlement Agreement. Hence, the plaintiff through its solicitors, Messrs Cheang & Ariff on 16 June 2009 issued a letter of demand on both defendants for the principal sum of RM10,000,000 together with accrued interest of RM362,958 as of 8 June 2009 and such further interest on the principal sum at the rate of 14.4%pa from 9 June 2009 until full settlement.

[12] The defendants did not pay as demanded and the plaintiff took legal action against Apac Sunrise via a winding up petition and the defendants via a Civil Suit No D-22–1359 of 2009 in the High Court of Malaya at Kuala Lumpur ('the suits').

[13] Subsequently the plaintiff and a Malaysia Land Properties Sdn Bhd (which is related to the plaintiff and another creditor of Apac Sunrise) went to

further negotiations with Apac Sunrise and reached a further settlement by the execution of another settlement agreement dated 25 June 2010 ('the second settlement agreement') that included the withdrawal of the suits. The material terms of the second settlement agreement are reproduced as follows:

> Acknowledgement Of Indebtedness
>
> 1. APAC hereby irrevocably agrees and acknowledges that APAC is indebted to ML and MLP jointly the sum of RM14,755,854.67 ['the Debt'].
>
> Repayment Of Debt
>
> 2. Towards repayment of the Debt, APAC hereby agrees to make the 36 monthly instalments payments in the amounts and the times enumerated in the Table hereinbelow:-

Instalments Nos.	Amount (RM)	On or Before
1.	RM150,000	1st day of August 2010
2.	RM150,000	1st day of September 2010
3.	RM150,000	1st day of October 2010
4 to 36	RM433,510.75	the 1st day of each month commencing from the month of November 2010 and ending on the month of July 2013.

> Entire Agreement
>
> 11. This Agreement supersedes and/or cancels all other agreement/s whether oral or written made prior to the date of this Agreement and embodies all the agreements relating to the settlement to the Debt herein made between the Parties. Simultaneous with the signing of the Agreement, APAC shall cause Dato' Pua Woon Kee to sign the appointment of stakeholders and declaration of trust as attached in the first schedule and second schedule hereto.

[14] There was also written declaration of trust dated 25 June 2010 ('declaration of trust') made by the second defendant to the plaintiff appended to the second settlement agreement which has the express provision that the validity and enforceability of the guarantee shall not be in any way affected by the second settlement agreement.

[15] This writ action was then commenced by the plaintiff on 30 June 2010.

THE PLAINTIFF'S CASE

[16] The plaintiff's claim against both defendants is that via the loan agreement, the plaintiff agreed to loan the sum of RM10m to Apac Sunrise with interest at 1% per month.

[17] It is common ground that RM10m was disbursed by the plaintiff to Apac Sunrise on 8 August 2008.

[18] The defendants do not dispute that Apac Sunrise had defaulted on the loan agreement by having failed to make repayments of RM10,100,000 on the due date of 8 December 2008.

[19] At the request of Apac Sunrise, the plaintiff on 20 February 2009 entered into the first settlement agreement with Apac Sunrise whereby the plaintiff granted Apac Sunrise an extension of time until 8 June 2009 to repay the sum of RM10m with interest at the rate of 14.4%pa.

[20] By the guarantee, the defendants jointly and severally guaranteed the repayment of the RM10m and all interest accrued to the plaintiff under cl 1 of the guarantee.

[21] It is not in dispute that Apac Sunrise had defaulted in the repayment as provided in the first settlement agreement because the MBB Cheque No 454199 in the sum of RM10m was dishonoured. Accordingly, the defendants are indebted in the sum of RM10,362,958 to the plaintiff as of 8 June 2009. The plaintiff further contended that the second settlement agreement did not affect the defendants' indebtedness.

THE FIRST DEFENDANT'S DEFENCE

[22] In essence, the first defendant's pleaded defences are as follows:

(a) the first settlement agreement was signed by her under duress and after the execution of the first settlement agreement, she then realised that she actually signed the guarantee;

(b) the second settlement agreement was executed without her knowledge and consent; and

(c) the second settlement agreement superceded/cancelled the loan agreement, first settlement agreement and the guarantee.

THE SECOND DEFENDANT'S DEFENCE

[23] As for the second defendant, the following are the defences as pleaded:

(a) the loan agreement contravened the Moneylenders Act 1951;

(b) the first settlement agreement was entered between the plaintiff and Apac Sunrise and he had no knowledge of the terms therein;

(c) the first settlement agreement also contravened the Moneylenders Act 1951;

(d) the guarantee is unenforceable because the guarantee is without consideration and/or is of past consideration; and

(e) the second settlement agreement superceded/ cancelled all agreements whether oral or written made prior to the second settlement agreement.

FINDINGS OF THE COURT

[24] From the claim and defences as pleaded, the issues for determination by this court involve both issues of fact and law. It is in my view more practical herein to resolve the factual issues first and then to follow with the legal issues. The legal issues are dependent and controlled by the findings of fact.

[25] It is seen that certain evidence adduced on the factual issues are in conflict from the testimony of the witnesses of the parties particularly that between the plaintiff and first defendant. The resolution of the conflict necessarily requires the application of ss 101 to 103 of the Evidence Act 1950, to wit:

> 101 Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 102 On whom burden of proof lies
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 103 Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[26] The interpretation and application of these provisions are lucidly explained by Augustine Paul JC (as he then was) in *Tan Kin Thuan v Tan Kee Kait (M) Sdn Bhd* [1998] 1 MLJ 697: 'It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party ... what shifts is the responsibility of adducing evidence to discharge that burden ... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden

of proof lies or by calling witness or by giving evidence himself or a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. If the party whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail to him to turn around and say that the respondent has not established his.'

[27] In this regard, I must add that it is incumbent on the party where the burden lies to first adduce evidence that is believable to satisfy the court he has discharged his evidential burden before the burden shifts to the other party to rebut it by different methods as alluded by His Lordship. The rebuttal may then either result in the evidence originally adduced continues to be believable or become discredited. The evaluation of the evidence for believability and veracity will principally include the demeanor of the witness as observed by the court and testing their testimony for consistency with the pleadings, testimony of other witnesses and the contemporaneous documentary evidence. Actions and inactions of the parties at the material time of the occurrence of the factual events are also duly examined particularly any explanation to justify them. Ultimately the court will critically weigh all the evidence adduced by both parties and make the determination as to whether the party that bears the burden has proved the fact in issue on the balance of probabilities.

DURESS

[28] Accordingly, I will first deal with the complaint of the first defendant that the first settlement agreement was executed by her on behalf of Apac Sunrise under duress.

[29] The first defendant was appointed as a director of Apac Sunrise on 8 August 2008, several months after the loan agreement had been executed by the second defendant on behalf of Apac Sunrise. She testified that she was on 10 February 2009 confronted in the office of Apac Sunrise by three staffs of the plaintiff, namely PW1, PW2 and PW3 to execute the first settlement agreement as drawn up by the plaintiff. She was afraid of them by reason that the plaintiff is known to be an 'Along' (commonly understood as loan sharks). These staffs allegedly in a loud manner orally threatened her that they would not leave the office unless and until the first settlement agreement is executed on that day.

[30] This office incident was witnessed by DW1 and DW2. The first defendant further claimed that she did not then have the opportunity to confer with the second defendant.

[31] The first defendant also testified she did not fully understand the contents of the first settlement agreement because she was not afforded the opportunity to review the document. She finally but reluctantly signed the first settlement agreement subject to certain conditions stated in her letter written on behalf of Apac Sunrise dated the same day, 10 February 2009 . The letter was handed later to a Terence Tan of the plaintiff.

[32] The plaintiff however denied that the first settlement agreement was procured under duress based on the testimonies of PW1 and PW3. According to them which contrastingly are opposite to that as testified by the first defendant, the first defendant had at the material time contacted the second defendant by telephone to discuss the contents of the first settlement agreement. They however acknowledge she was in tears during the conversation over the telephone. The occurrence of the teleconversation is corroborated by the testimony of the second defendant who recalled that telephone call.

[33] After that telephone conversation and as requested by the first defendant, the plaintiff agreed to amend the interest rate from 18%–14.4% pa. The first defendant then willingly signed the first settlement agreement after amendments were made to cll 1, 2.1(c) and 3(a) of the first settlement agreement.

[34] In addition, it was testified by PW1 that there was a further meeting held 20 February 2009 between him, Terence Tan and both the defendants. In the result, he dated the first settlement agreement as 20 February 2009 and attested to the signing of the guarantee by both the defendants on that day too. The first defendant thereafter signed the letter of Apac Sunrise dated 20 February 2009 and handed over to Terence Tan with enclosures comprising of documents which included the guarantee stated in that letter. Both the defendants could not give a clear account of what happened on 20 February 2009.

[35] I prefer and find the version of the incident that took place on 10 February 2009 is that as testified by the plaintiff's witnesses where it conflicts with that testified by the defendants' witnesses, especially the first defendant herself. I am mindful that the first defendant is a non-practicing advocate and solicitor by profession and is undoubtedly able to comprehend the proposed terms of the first settlement agreement. The terms are to my mind rather straightforward. Likewise, PW1 is a non-practicing advocate and solicitor. The other staffs of the plaintiff namely PW2 and PW3 are also professional men. The three of them who met the frst defendant on 10 February 2009 are therefore not hooligans or ruffians of the street often hired by loan sharks for

debt collection. I do not believe from my observation of their demeanour in court that they would have intimidated the first defendant.

[36] The meeting of 10 February 2009 took place at Apac Sunrise's office. The purpose was to recover the outstanding plaintiff's loan. The first defendant did not produce any CCTV taped recording of the meeting to assist the court. From the testimony of the plaintiff's witnesses and my observation of their mannerism in court, I find that the meeting was conducted in a civil manner. The plaintiff merely wanted APAC Sunrise to agree to terms as drawn up in the settlement agreement by the plaintiff. Verbal negotiations however ensued. The first defendant spoke to the second defendant over the telephone to discuss the terms. The plaintiff thereafter entertained counter proposals made by the first defendant after the telephone call. Ultimately certain amendments were made to several clauses of the first settlement agreement. In my view, the fact that alterations were made to the agreement suggest that the agreement was signed voluntarily rather than by compulsion.

[37] I am sure that it was a firm commercial bargain conducted in a tense atmosphere. The first defendant was in my view merely upset and hence in tears on that day. However I find that the first defendant was at all material times not threatened with physical harm. I am not convinced that she was even under false imprisonment in her office. The negotiations were witnessed by the first defendant's colleagues DW1 and DW2 who would have easily called in the police if the first defendant was indeed endangered in any way. They did not do so. The first defendant did not also subsequently make any police report on the incident. This would have been the natural follow up consequence if she was in fact put under duress and false imprisonment. I therefore disagree with the first defendant's argument that she was crying for fear and forced to sign the first settlement agreement.

[38] It has been held by Low Hop Bing J (as he then was) in *OCBC Securities (Melaka) Sdn Bhd (formerly known as Sykt Tan, Chow & Loh Securities Sdn Bhd) v Koh Kee Huat* [2004] 2 MLJ 110 that the concept of duress and coercion have been used interchangeably. By s 15 of the Contracts Act 1950: "Coercion' is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.'

[39] His Lordship Low Hop Bing J also adopted the dicta and guidelines drawn by the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614 that: 'Duress, whatever it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corpn v Skibs A/S Avanthi* [1976] 1 Lloyd's Rep 293, 336 that in a

contractual situation commercial pressure is not enough. *There must be present some factor which could in law be regarded as a coercion of his will so as to vitiate his consent … In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering into the contract he took steps to avoid it*. All these matters are, as was recognised in *Maskell v Homer* [1915] 3 KB 106 relevant in determining whether he acted voluntarily or not.' (Emphasis added.)

[40] Furthermore it appears necessary from the Court of Appeal case of *Soo Lip Hong v Tee Kim Huan* [2006] 2 MLJ 49; [2005] 1 MLRA 801 that a contemporaneous police report has to be made reporting the duress. In that case Mohd Ghazali Yusoff JCA (as he then was) said: 'There was no evidence of any police report or similar thing alike to suggest that PW1 was attempting to cheat DW1. In the absence of such evidence, the only irresistible factual inference I could draw would be for purposes(s) of purchasing the relevant property by PW1 from DW1 as agreed by both parties as evidenced by P1.'

[41] Consequently, I find and hold that the first defendant was not under duress when she signed the first settlement agreement. The circumstances on 10 February 2009 as found do not disclose that the first defendant was subjected to actionable coercion as defined in the Contracts Act 1950. Put simply, the first defendant voluntarily signed the first settlement agreement after having conferred with the second defendant over the telephone conversation that was followed by haggling with the plaintiff on the terms thereafter. She needed no independent advice because she is herself a non-practicing advocate and solicitor.

[42] In addition, besides the absence of any police report made by her, I find that the alleged letter of protest of the first defendant dated 10 February 2014 to justify the alleged duress was not to rescind the first settlement agreement. There is no also mention of duress therein. On careful reading of the letter, the contents were in fact to qualify that cll 2.2 and 3 are subject to the confirmation of the second defendant. By inference, the other terms must have therefore been accepted during the telephone conversation between the first and second defendant on that day.

[43] Both defendants met the plaintiff again on 20 February 2009 when the first settlement agreement was dated by PW1. By this time, it is conclusive that the first settlement agreement was wholesomely agreed and accepted by all the parties. After the first settlement agreement was dated, it was followed with signing of the guarantee by both the defendants without protest whatsoever. I

cannot therefore accept the second defendant's contention that he was unaware of the terms of the first settlement agreement as pleaded, otherwise he would not have signed the guarantee that is based and hinged on that settlement agreement. The allegation of duress only surfaced when this suit was filed in 2010. The first defendant's pleaded position that she signed the first settlement agreement to only realise that she actually signed the guarantee is incredulous. She was badly mistaken because she had in reality signed on two documents, to wit: the first settlement agreement on 10 February 2009 and the guarantee subsequently on 20 February 2009. In the circumstances, the irresistible inference and I so find is that both the first settlement agreement and the guarantee were executed voluntarily without duress.

FORGERY

[44] There is the further factual issue that the first defendant has now contended (which has not been pleaded whether in the original or amended defence), to wit: she did not sign the following documents:

(a) the first settlement agreement at pp 58 and 59;

(b) the guarantee;

(c) the letters dated 20 February 2009 and 20 March 2009; and

(d) the two cheques dated 8 June 2009 for the sum of RM10,000,000 and RM673,424.65.

In other words, the signature on those documents is claimed to be forged.

[45] As submitted by the plaintiff, it is trite law that a litigant is bound by its pleadings following *State Government of Perak v Muniandy* [1986] 1 MLJ 490; [1985] 1 MLRA 423 and *SS Saw v Siew Heen Yuen & Ors (Siew Boon Hong @ Shandran & Ors, interveners)* [2009] 2 MLJ 214; [2009] 2 CLJ 140. In addition, these documents are classified in category A, to wit: the authenticity and contents thereof are undisputed. In the Court of Appeal case of *Raja Lob Sharuddin Raja Ahmad Tezali & Ors v Sri Seltras Sendirian Bhd* [2008] 2 MLJ 87; [2007] 3 MLRA 224 Azmel Maamor JCA (as he then was) held: 'And if a document is put in bundle A, where the parties have agreed to its production and content, no party would be allowed to ask any question at all on that document.'

[46] I find and hold that the first defendant's allegation of forgery is plainly an afterthought and cannot be accepted here both on the pleadings as well as by reason of estoppel for having agreed pre-trial to the authenticity and contents of the documents.

[47] In any case, the first defendant has also not discharged her onus of proof of forgery as alleged by leading cogent evidence such as the opinion of a handwriting expert to assist the court to make the determination. It is insufficient for the first defendant to just make a bare assertion that her signature on those documents was forged. That notwithstanding, the assertion is in contradiction with the fact that her signing on those documents was witnessed by the plaintiff's witnesses.

EFFECT OF SECOND SETTLEMENT AGREEMENT ON GUARANTEE

[48] Having determined both the factual issues in dispute, I accordingly hold that the frst settlement agreement and the guarantee were properly and validly signed by the defendants.

[49] The next issue to wrestle with is the legal issue as to whether the guarantee is invalidated by the execution of the second settlement agreement. In this respect, s 86 of the Contracts Act 1950 provides: 'Any variance, made without surety's consent, in terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.'

[50] In *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202; [1990] 5 MLRH 494, Zakaria Yatim J (as he then was) held: 'the above section is pari materia with s 133 of the Indian Contracts Act 1872. The Indian Supreme Court has interpreted the words 'any variance' to mean substantial variation. In *MS Amiruddin v Thomcos's Bank Ltd* AIR 1963 SC 746, Hidayatullah J, in his judgment at p 753 said: ... the law now accepts that unsubstantial alterations which are to the benefit of the surety do not discharge the surety from liability. Of course, if the alteration is to the disadvantage of the surety, or its unsubstantial character is not self evident, the surety can claimed to be discharged. The court will not then enquire whether it in fact harmed the surety ...'.

[51] The Court of Appeal in *Maplelee Property Sdn Bhd v Tan Lei Fon* [2005] 1 CLJ 599 went further and held that: 'Even if there was a variance of cl 1.2 and it was neither unsubstantial nor not prejudicial to the respondent, cl 3(2)(vi) of the letter of guarantee operated to prevent the respondent from being discharged as guarantor or surety. By that clause the respondent agreed to be liable as a principal debtor. What would not discharge or affect the liability of the company as principal debtor would therefore not discharge the respondent or affect her liability as guarantor.' It is made clear in *Mahzan bin Othman v Perbadanan Usahawan Nasional Berhad* [2012] 1 LNS 587 that s 86 of the

Contracts Act 1950 has no application if the guarantor is not mere surety but also a principal debtor.

[52] It is unnecessary here to consider the application of s 86 of the Contracts Act 1950 particularly as to whether the variation is substantial to the detriment of the defendants because the defendants have in the guarantee plainly assumed the obligation not merely as guarantors but as principal debtors. Thus the case of *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485; [1990] 1 CLJ (Rep) 141 relied by the first defendant is distinguishable on the facts herein.

[53] That notwithstanding, the contention by the first defendant that she had no knowledge and did not consent to the execution of the second settlement agreement is not sufficient per se to invalidate the guarantee. There is no legal authority cited by the first defendant to support that proposition. To my mind, it is the legal consequence of the second settlement agreement on the first settlement agreement on its true construction that matters.

[54] Both defendants strenuously argue that by cl 11 of the second settlement agreement, the first settlement agreement is superseded and/or cancelled and relied on the cases of *Puteh Aman Power Sdn Bhd v Bittersweet Estate (Sabah) Sdn Bhd* [2012] MLJU 834; [2012] 10 CLJ 723 and *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585; [2005] 2 CLJ 596 to justify their point. In other words, there is no longer an underlying basis upon which the guarantee is attached and accordingly both the defendants must be discharged or relieved from any liability under the guarantee.

[55] The background on the creation of the second settlement agreement is explained by PW1 that it was the merger of two debts owing by Apac Sunrise to the plaintiff and Malaysia Land Properties Sdn Bhd. The second settlement agreement superseded the first settlement agreement only on terms of repayment.

[56] On close scrutiny, I find and hold that cl 11 of the second settlement agreement does not void or nullify the first settlement agreement altogether as contended by the defendants. Certain obligations under the first settlement agreement were instead varied and both the varied and originally non varied obligations are subsumed in the second settlement agreement. This is made clear by the expression embodiment of the agreements in cl 11. As the result, the obligations of the defendants under the guarantee. have to be now construed and ascertained from the four corners of the second settlement agreement that modified the first settlement agreement. In fact, the second defendant has even expressly recognised the continuing validity and effect of

the guarantee in the declaration of trust that was signed concurrently with the second settlement agreement pursuant to cl 11 thereof.

[57] Be that as it may, I have noted that by cl 1 of the second settlement agreement, the total indebtedness is RM14,755,854.67 but there is no breakdown as to the amount owing to the plaintiff and Malaysia Land Properties Sdn Bhd respectively. The plaintiff asserts that the portion of the amount owing to the plaintiff is still maintained at RM10,362,958 which is the amount due on 8 June 2009. It is also the amount claimed in this suit. The correctness of this amount has not been challenged by the defendants at the trial save for the argument by the second defendant that the amount included interest imposed in contravention of the Moneylenders Act 1951.

[58] The material provision is cl 2 of the second settlement agreement which deals with repayment. This clause formed the thrust of the agreement because the dominant purpose is to restructure the repayment as testified by PW1. The guarantee is hence subject to the repayment terms as provided in cl 2. Accordingly, the enforcement of the guarantee including any action in court is governed by that provision.

CONTRAVENTION OF THE MONEYLENDERS ACT

[59] The second defendant's initial written arguments on this point were hazy. At the clarification stage, the contentions are reduced and confined to two aspects:

(a) The plaintiff failed to provide the particulars of the outstanding amount claimed in the form as per the First Schedule A thereby contravening s 19 of the Moneylenders Act 1951 ('the Act'); and

(b) The plaintiff's claim of RM10,362,958.00 included wrongly charged interest rate of 1% per month instead of default interest rate of 8%pa from 9 December 2008–8 February 2009 and subsequent interest rate of 14.4%pa as set out in the first settlement agreement in contravention of s 17(1) and s 17A of the Act.

[60] As to the first contention, s 19(1) of the Act provides:

> In respect of any moneylending agreement in respect of money lent by a licensee, whether made before or after the commencement of this Act, the licensee shall, on any reasonable demand in writing made by the borrower at any time during the continuance of the moneylending agreement and on the tender by the borrower of three Ringgit for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, a statement of account in English figures signed by the licensee showing —

(a) the date on which the loan was made, the amount of the principal of the loan and the rate per centum per annum, or the amount of interest charged; and

(b) the amount already received by the licensee in respect of the loan and the date on which it was made; and

(c) the amount of all sums due to the licensee for principal but unpaid and the dates upon which they became due and the amount of interest due and unpaid in respect of each such sum; and

(d) the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

A statement of account given in the form in the First Schedule A shall be deemed to comply with the requirements of this subsection.

[61] I find and hold that this contention of the second defendant is misconceived and frivolous. There is firstly no evidence adduced by the second defendant of Apac Sunrise's written demand for the statement of account and payment of the prescribed charge made by the second defendant. Hence, the plaintiff was not obliged to supply the statement. In any case, the plaintiff has produced for the trial a statement of account in bundle D p 1–2 which in substance complied with the Act. It is not fatal if the prescribed form has not been followed as made clear in s 62 of the Interpretation Acts 1948 and 1967: 'Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that from shall not be invalidated by reason of any deviation has no substantial effect and is not calculated to mislead.'

[62] In respect of the second contention on the interest rates charged, the second defendant relied on s 17(1) of the Act which reads:

Any moneylending agreement made on or after the commencement of this Act, for a loan of money by a licensee shall be illegal in so far as it provides, directly or indirectly, for a payment of compound interest, or for the rate or amount of interest to be increased by reason of any default in the payment of sums due under the moneylending agreement.

Provided that provision may be made in any such moneylending agreement that if default is made in the payment upon the due date of any sum or interest payable to the licensee under the moneylending agreement, whether in respect of principal or interest, the licensee shall be entitled to charge simple interest on the unpaid sum or instalment which shall be calculated at the rate of eight per centum per annum per day to day from the date of default in the payment of the sum or instalment until that sum or instalment is paid, and any interest so charged shall not be reckoned for the purpose of this Act as part of the interest charged in respect of the loan.

as well as s 17A(1) which reads:

A For the purposes of this Act, the interest for a secured loan shall not exceed twelve percentum per annum and the interest for an unsecured loan shall not exceed eighteen percentum per annum.

B **[63]** Be that as it may, the case of *Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing* [2006] 5 MLJ 589; [2006] 2 MLRH 338 is also instructive. In that case, the plaintiff which is a licensed money lending company granted a loan facility of RM10m to the defendant by a memorandum of agreement dated 23 May 1997. The defendant failed to repay the loan at the end of the loan period and the plaintiff accordingly filed a suit C in the High Court at Kuala Lumpur. The plaintiff and the defendant however on 21 October 1998 entered into a settlement agreement for the sum of RM7,208,611.76 and the suit was discontinued. The defendant again defaulted in its repayment under the settlement agreement and the plaintiff D re-filed this suit. As to the interest rate charged pursuant to the settlement agreement, Abdul Malik Ishak J (as he then was) held: 'In regard to the interest rate, I have this to say. That the interest rate should be 16.5%pa as per the settlement agreement for the simple reason that this was what was *agreed upon* between the parties.' (Emphasis added).

E

[64] It can be discerned and I so hold that the terms of the original moneylending agreement must be in compliance with the Act, otherwise that agreement is illegal and unenforceable. In the course of the performance of a conforming and valid moneylending agreement, the parties may however by F further agreement supported with valuable consideration alter or vary the terms including those on interest. In the absence of an agreement to vary, any unilateral change in the interest imposed makes the lender in breach but that does not invalidate the original moneylending agreement.

G **[65]** On the facts of this case, there is no doubt nor now disputed (though originally pleaded only by the second defendant) that the loan agreement dated 8 August 2008 conformed to the Act. Moreover it is clear from the execution of the first and second settlement agreements that the rate of interest of 14.4%pa and the computation of the amounts owing therein were plainly agreed to H between the plaintiff and Apac Sunrise. There was valuable consideration by way of the extended time given for the loan repayment via instalments comfortable to Apac Sunrise and the second defendant particularly. It is also seen that Apac Sunrise on 21 April 2009 willingly paid the sum of RM110,465.75 to the plaintiff being interest charged at the rate of 14.4%pa I from 9 February 2009 to 8 March 2009. By such conduct, Apac Sunrise and the defendants are hence also estopped from now resiling on their earlier position adopted. This is made clear in *Then Ming Ming v Mount Kinabalu Adventurous Travel (Sabah) Sdn Bhd & Ors* [2010] MLJU 1666; [2010] 12 MLRH 211 where David Wong Dak Wah J (as he then was) quoted the

following passage from *Roe v The Mutual Loan Fund, Limited* (1887) 19 QBD 437: '... a man cannot say at one time that the transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void, for purpose of securing some further advantage ...'.

NO OR PAST CONSIDERATION

[66] The second defendant also contended that the guarantee is invalid for want of consideration. Alternatively the consideration is past. On both score, the guarantee is void by virtue of s 26 of the Contracts Act 1950.

[67] The general rule under English law is that past consideration is no consideration. There are nevertheless exceptions such as where the act was originally done at the request of the promisor and it was subsequent to the doing of the act that the promise was made as was the case in *Lampleigh v Brathwait* (1615) 80 ER 255. This position is codified in s 2(d) of the Contracts Act 1950 and affirmed in the Supreme Court case of *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355.

[68] The second defendant merely makes a bare assertion without substantiating as to why and how consideration was absent or past as far as the guarantee is concerned. To the contrary, I find and hold that the consideration for the guarantee herein is plainly seen in the preamble of the document where the defendants as both guarantors and principal debtors requested the plaintiff to enter into the first settlement agreement that was concurrently executed with the guarantee. In the premise, the second defendant's argument on this point is bad in limine.

[69] Up to this point, I am minded to enter judgment in favour of the plaintiff because it is clear that the defences raised by both defendants are unsustainable.

PREMATURE ACTION

[70] On close reading of the second settlement agreement in particular cl 2 which deals with repayment, the court posed a further issue to the parties as to whether this action was prematurely brought in court. The writ herein was filed on 30 June 2010, though amended twice on 31 January 2012 and 28 May 2013. It is pertinent to note that the second defendant was only brought in and added as a party by the amendment to the writ on 31 January 2012. In respect of repayment pursuant to the second settlement agreement, the first instalment payment as provided in cl 2 was only to commence on 1 August 2010.

[71] Generally, the law on accrual of the cause of action is seen in the Federal Court case of *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225. In that case, the respondent had contributed RM100,000 to a partnership and it had been agreed that this amount to be repaid to him, RM15,000 on the execution of the agreement, RM35,000 on or before 12 October 1972, and the balance of RM50,000 by monthly instalments of RM10,000 on the 12th day of each succeeding month. There was no provision in the case of default of any one instalment, the remaining instalments should become immediately due and payable. The respondent on 7 October 1972 took out a writ claiming amongst others payment of RM85,000 with interest. The Federal Court in reversing the High Court found that the respondent did not on 7 October 1972 have any cause of action in respect of the RM85,000 or any part thereof as no instalments were then due.

[72] It is thus clear in this case that the plaintiff's cause of action has not yet accrued against the defendants both as guarantors and principal debtors of the obligations of Apac Sunrise under the second settlement agreement at the date of filing of the writ.

[73] Nevertheless, the plaintiff submitted that the second defendant was only brought in to the suit by amendment as an added party on 31 January 2012 and accordingly relied on *Folin & Brothers Sdn Bhd v Wong Foh Ling & Wong Swee Lin & Ors* [2001] 2 MLJ 23; [2000] 3 MLRH 751 where Abdul Malik Ishak J (as he then was) held: '... It would appear that Lord Keith of Kinkel suggested, quite rightly, that the cause of action against the added defendant pursuant to RSC O 15 r 8(4)(a) arose only from the date of the amendment and service of the amended writ. His Lordship Lord Keith of Kinkel also held the view, quite rightly, that prior to the order allowing the amendment and service of the amended writ, there was no cause of action against the defendant because the defendant was not a party to the proceeding as yet ...' The plaintiff accordingly concluded that the action against the second defendant is not premature.

[74] On first blush it appears that the aforecited dicta of Abdul Malik Ishak J conflicts or is otherwise an exception to the general principle established in *Simetech (M) Sdn Bhd v Yeoh Cheng Liam Construction Sdn Bhd* [1992] 1 MLJ 11 that the amendment relates back to the date of the original pleading and no claim relating to a new cause of action which has accrued since the original pleading is allowed. However on close reading of His Lordship Abdul Malik Ishak's judgment in totality, it is seen that His Lordship actually quoted Lord Keith's dissenting speech in *Ketteman and Others v Hansel Properties Ltd* [1988] 1 All ER 38 and later clarified that this speech was only confined to limitation purposes that was in issue in the *Ketteman*'s case. In other words, it is an exception available to the added defendant who pleads limitation in defence.

The general principle continues to apply to the plaintiff who sues: in that the actionable cause against the added defendant must have accrued at the date of the filing of the original writ.

[75] In the circumstances, I find and hold that the plaintiff's action herein against both the first and second defendants pursuant to the guarantee is premature.

CONCLUSION

[76] By the sole reason that this action is prematurely brought by the plaintiff, the claim of the plaintiff is hereby dismissed. It is just in my view that there should be no order to costs on the unique outcome of this case and I so order. The plaintiff is also given the liberty to refile the action.

Plaintiff's claim dismissed with no order as to costs:

Reported by Kanesh Sundrum